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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re E.R., a Person Coming Under the Juvenile
Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ERNESTO R.,

Defendant and Appellant.

F077875

(Super. Ct. No. 17CEJ300054-2)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Leanne Le Mon,
Commissioner.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant
and Appellant.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Franson, J. and Peña, J.

INTRODUCTION

Appellant Ernesto R. is the biological father of E.R. He contends the juvenile court erred in terminating his parental rights and setting a permanent plan of adoption.¹ We affirm.

FACTUAL AND PROCEDURAL SUMMARY

The Fresno County Department of Social Services (department) received a referral alleging general neglect on January 13, 2018.² Mother had given birth to E.R. at 34.4 weeks into her pregnancy, reported using methamphetamine throughout her pregnancy, and tested positive for methamphetamine and marijuana. When a social worker went to the hospital in response to the referral and interviewed mother, mother admitted using methamphetamine and marijuana daily throughout her pregnancy.

Mother identified Ernesto as E.R.'s father. Mother stated she and Ernesto were no longer in a relationship and he wanted a paternity test to confirm he was E.R.'s father. Mother had identified Ernesto as the father of her daughter, but a paternity test determined he was not the father. Mother reported that Ernesto used methamphetamine, but not as much as she did.

On January 17, a Welfare and Institutions Code³ section 300 petition was filed on behalf of E.R. alleging the minor was at substantial risk of suffering serious physical harm or illness because mother tested positive for methamphetamine and marijuana at the time of his birth; mother had attended only two prenatal visits; and mother admitted using methamphetamine and marijuana throughout her pregnancy because she had used these substances during her first child's pregnancy and felt it was "unfair" not to do so while

¹ The minor's mother, J.R., is not a party to this appeal.

² References to dates are in the year 2018, unless another year is specified.

³ References to code sections are to the Welfare and Institutions Code unless otherwise specified.

pregnant with E.R. The petition also alleged that E.R. was at risk of abuse or neglect because a sibling had been abused or neglected. Mother's first child, a daughter, had been placed for adoption after mother failed to complete a court-ordered case plan, including substance abuse treatment, and failed to reunify with the child. The petition listed Ernesto as the alleged father of E.R.

The detention report states that at the January 17 team decision meeting, Ernesto did not attend, and mother stayed for only 10 minutes. The decision was to have E.R. remain in out-of-home care.

A social worker went to the address for mother and the address for Ernesto, as shown on the CalWIN database, but neither was at home. The social worker left a letter, in a sealed envelope, at each address setting forth the date, time, and location of the detention hearing.

Ernesto did not appear at the January 18 detention hearing; mother appeared, and counsel was appointed for her. Mother verified that as far as she knew, Ernesto still resided at the address where the social worker had left the letter for Ernesto; the address was next door to where mother lived. At the detention hearing, the juvenile court continued E.R. in out-of-home placement. The jurisdiction hearing was set for February 6.

Ernesto appeared at the February 6 jurisdiction hearing; Ernesto was in custody at that time. Counsel was appointed for Ernesto in E.R.'s case and counsel requested DNA testing to determine if Ernesto was E.R.'s biological father. The juvenile court ordered the department to conduct testing to determine if Ernesto was E.R.'s biological father. The juvenile court asked Ernesto how long he would be in custody; Ernesto responded that he did not know but had a court hearing the next day. The juvenile court told Ernesto that if he remained in custody "they should test you." If he was released from

custody, Ernesto was told to contact the department to follow through and set up the DNA testing.

Also on February 6, the juvenile court found the allegations of the section 300 petition to be true and found E.R. was a child described by section 300, subdivisions (b) and (j). The disposition hearing was set for March 20.

The disposition report submitted by the department states that a DNA test was initiated on March 7, but as of the preparation of the report on March 13, no appointment for the testing had been set. The disposition report does not explain why the department waited until one month after the jurisdiction hearing to initiate the DNA testing ordered by the juvenile court on February 6.

The disposition report does not contain any information about Ernesto or any assessment of his relationship, if any, with E.R. The disposition report recommended that reunification services be denied Ernesto pursuant to section 361.5, subdivision (a) and that a section 366.26 hearing to select a permanent plan be set.

At the March 20 disposition hearing, Ernesto was present with his counsel. The department submitted the matter. Ernesto's counsel objected to the department's recommendations regarding Ernesto and stated if her client was determined to be E.R.'s father, then Ernesto wanted his sister and mother included in the permanent plan process.

The juvenile court stated that reunification services were not to be provided to Ernesto pursuant to section 361.5, subdivision (a). The matter was set for a section 366.26 permanent plan hearing on July 3.

The report prepared for the section 366.26 hearing states that E.R. has been placed in his prospective adoptive home since he was discharged from the hospital on January 15. The social worker noted that E.R. was happy, healthy, and appeared to be very attached to the prospective adoptive parents. Ernesto had completed a DNA test on April 5, which determined it was 99.9 percent likely that Ernesto was E.R.'s father. The

report noted that the juvenile court had never made an order for visits between Ernesto and E.R.

The section 366.26 report also noted that Ernesto was in custody when E.R. was born in January. Ernesto was not released from custody until June 18. After his release, Ernesto had not contacted the department to inquire about E.R.'s well-being or to request visits. Due to the lack of any contact between Ernesto and E.R., the social worker opined that there was no parent-child relationship, it would not be detrimental to E.R. to terminate parental rights, and that adoption was in E.R.'s best interests.

The report opined that E.R. was generally and specifically adoptable, and the prospective adoptive parents were ready to proceed with an adoption. The recommendation was that parental rights be terminated, and a permanent plan of adoption be ordered for E.R.

At the July 3 section 366.26 hearing, Ernesto was deemed the biological father of E.R. The department asked that parental rights be terminated, and a permanent plan of adoption be set; Ernesto objected to the department's recommendations. A contested section 366.26 hearing was set for July 10.

Ernesto appeared with counsel at the July 10 contested hearing. The social worker testified that E.R. was considered adoptable because he was very young and healthy, with no known developmental or health issues. The social worker also testified that the DNA results were received by the department in the beginning of May. The social worker did not inform Ernesto of the results until June 26; she had been unaware that the previous social worker did not inform Ernesto of the DNA test results.

The social worker testified that she had observed one visit between Ernesto and E.R. that took place the day before the hearing; Ernesto cut short the visit because of E.R.'s "fussiness." The social worker opined that she saw no evidence of bonding between Ernesto and E.R. Ernesto had not filed any form requesting that he be provided

services to reunify with E.R. The social worker opined there was no bond between Ernesto and E.R. and E.R. would not suffer any detriment if Ernesto's parental rights were terminated.

The July 9 visit between Ernesto and E.R. was Ernesto's first visit with the infant, who was then about six months old. From the questions Ernesto asked the social worker, such as whether E.R. was walking yet, the social worker concluded Ernesto did not understand normal child development.

Ernesto's counsel argued that he had not been given an opportunity to demonstrate that he could be a parent to E.R. Counsel argued that Ernesto was incarcerated at the inception of the case, was informed he was an alleged father, submitted to the DNA test, and was informed only two weeks prior to the hearing of the results. As a result, counsel argued Ernesto was not given a chance to demonstrate he could care for the child. Counsel asked that Ernesto be provided with six months of reunification services.

The juvenile court noted that Ernesto had been incarcerated through June on "charges pertaining to domestic violence," and used methamphetamine. Ernesto currently was on felony probation. Based on his custodial status during most of the dependency case, Ernesto would not have been able "to participate in out-of-custody services" to reunify. The juvenile court noted that even if Ernesto's status as a biological father had been known earlier in the case, it would not have been inclined to grant services to Ernesto because it would not have been in the best interests of E.R. The juvenile court found E.R. was adoptable, terminated Ernesto's parental rights, and ordered E.R. placed for adoption.

Ernesto filed a timely notice of appeal.

DISCUSSION

Ernesto contends the juvenile court erred in proceeding with the section 366.26 hearing because the department unreasonably delayed in conducting DNA testing and in

disclosing the results of the testing, which denied Ernesto the opportunity to elevate his status to that of presumed father.

Presumed, Biological, and Alleged Fathers

There are three paternity designations recognized in dependency proceedings: presumed, biological, and alleged. A presumed father is one who satisfies one of the rebuttable presumptions set forth in Family Code section 7611, generally by marrying or attempting to marry the child's mother; with consent, being named on the birth certificate; or by publicly acknowledging paternity and receiving the child into his home. (Fam. Code, § 7611, subds. (a)-(d).) A biological father is one whose biological paternity has been established, but who has not achieved presumed father status. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15 (*Zacharia D.*)). An alleged father is a man who may be the father of the child but has not established biological paternity or presumed father status. (*Ibid.*)

A man's paternity status is important because it determines his rights vis-à-vis his child. Only presumed fathers enjoy the full array of parental rights. A presumed father is entitled to custody of his child under section 361.2 and reunification services under section 361.5. (*Zacharia D.*, *supra*, 6 Cal.4th at p. 451.) A biological father has no parental rights but may be offered reunification services if the court finds it would benefit the child. (§ 361.5, subd. (a).) An alleged father has no legal interest in the child until he establishes paternity. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1406.)

Establishing Parentage

Section 316.2, subdivision (a) and California Rules of Court,⁴ rule 5.635(a) and (b) require the juvenile court to inquire of the mother at the detention hearing, or as soon as practicable thereafter, as to the identity and address of all possible presumed or alleged fathers. As part of its inquiry, the juvenile court must determine whether parentage has

⁴ References to rules are to the California Rules of Court unless otherwise specified.

been established through court order or a voluntary declaration under the Family Code. (Rule 5.635(c).)

If after inquiry an alleged father is identified, the court clerk must provide him with a copy of the dependency petition, notice of the next scheduled hearing, and “Statement Regarding Parentage—(Juvenile)” (form JV-505) at his last known address by certified mail, return receipt requested, unless the petition was dismissed, dependency was terminated, the parent denied parentage and waived further notice or relinquished custody of the child. (Rule 5.635(g).)

If a person appears at a dependency hearing and requests a judgment of parentage on form JV-505, the court must determine whether that person is the presumed parent of the child, if that finding is requested. (Rule 5.635(h)(2).)

Analysis

A father’s status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled. (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159.) The three categories of fathers in juvenile dependency cases “are meant to ‘distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.’ ” (*In re P.A.* (2011) 198 Cal.App.4th 974, 979-980.)

“Presumed father status ranks highest.” (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) “[O]nly a presumed, not a mere biological, father is a ‘parent’ entitled to receive reunification services under section 361.5,” and custody of the child. (*Zachariah D.*, *supra*, 6 Cal.4th 435, 451; *In re Jerry P.*, *supra*, 95 Cal.App.4th at p. 801.) “In contrast, a biological father is not entitled to these rights merely because he wants to establish a personal relationship with his child.” (*In re P.A.*, *supra*, 198 Cal.App.4th 974, 980.) Reunification services, however, may be provided to a biological father who is not

also a presumed father “if the court determines that the services will benefit the child.” (§ 361.5, subd. (a).)

“Biological fatherhood does not, in and of itself, qualify a man for presumed father status under [Family Code] section 7611. On the contrary, presumed father status is based on the familial relationship between the man and child, rather than any biological connection.” (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018.) To become a presumed father, a man must fall within one of the categories enumerated under Family Code section 7611, “which sets out several rebuttable presumptions under which a man may qualify for this status, generally by marrying or attempting to marry the child’s mother or by publicly acknowledging paternity and receiving the child into his home.” (*In re J.L.*, *supra*, 159 Cal.4th at p. 1018.; *In re E.O.* (2010) 182 Cal.App.4th 722, 726-727.)

“[A] man who has neither legally married nor attempted to legally marry the child’s natural mother cannot become a presumed father unless (1) he receives the child into his home and openly holds out the child as his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity.” (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595-596.)

Here, the mother identified Ernesto as the father of E.R. and Ernesto was listed as the alleged father on the section 300 petition filed in January. Ernesto was notified of the dependency proceeding for E.R. prior to the detention hearing by personal delivery to his last known address. As an alleged father, Ernesto had an absolute right to notice of the proceedings, which he received. (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1351.)

Ernesto appeared at the February 6 jurisdiction hearing and counsel was appointed for him. At that time, Ernesto did not request services or that he be elevated to presumed father status; Ernesto requested DNA testing because he was not sure if he was E.R.’s biological father. Presumably, Ernesto was informed by his counsel that there would be a lapse of time between DNA testing and the results. We also presume that counsel

informed her client that he could achieve presumed father status under Family Code section 7611, even if not the biological father, and that a biological father would only be provided reunification services if the juvenile court found it to be in the child's best interests. (§ 361.5, subd. (a).)

At the disposition hearing on March 20, Ernesto was still in custody; he would not be released until June 18. Ernesto generally would not have been able to participate in services to reunify with E.R. until after his release, as the juvenile court noted. Even if the department had proceeded more expeditiously with DNA testing, and the results were known by the March 20 disposition hearing, Ernesto would have been merely a biological father. A biological father is not entitled to reunification services; the juvenile court may order reunification services if it will benefit the child. (§ 361.5, subd. (a).)

Moreover, even if Ernesto achieved biological status as of the March 20 disposition hearing, a juvenile court is not required sua sponte to elevate a man to presumed father status. (*In re O.S.*, *supra*, 102 Cal.App.4th at p. 1410.) Ernesto had not taken any steps to achieve presumed father status and as a biological father, reunification services were discretionary with the juvenile court.

Furthermore, as the juvenile court stated, reunification services likely would not have been ordered for Ernesto as a biological father if he had achieved that status as of the disposition hearing. Ernesto used methamphetamine and was incarcerated on charges stemming from domestic violence. The juvenile court stated its opinion that reunification services for Ernesto would not have been in E.R.'s best interests. The decision whether to provide a biological father with reunification services is entrusted to the juvenile court's discretion. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 589.)

With respect to the termination of Ernesto's parental rights, when an unwed father "promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to

due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.” (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849.) Ernesto did not promptly demonstrate a commitment to E.R. from the inception of the case and did not assert status as a *Kelsey S.* father in the juvenile court.

The section 366.26 hearing was held approximately six months after E.R. was taken into custody and after Ernesto was determined to be the biological father. At the early stages of the case, Ernesto did not acknowledge E.R. to be his child, did not ask that he be listed on E.R.’s birth certificate as the child’s father, and did not want to be elevated to any status other than alleged father status unless DNA testing showed him to be the biological father. A juvenile court may terminate the parental rights of a biological father who had the opportunity to become a presumed father but did not do so, as is the case with Ernesto. (*In re A.S.* (2009) 180 Cal.App.4th 351, 362.)

A biological father’s parental rights may be terminated solely based on the child’s best interests. (*In re Sarah C.* (1992) 8 Cal.App.4th 964, 981.) Here, E.R. had been in foster care from the time he left the hospital at birth until the section 366.26 hearing date, a period of about six months. He was healthy, happy, and bonded with his caregivers, who wanted to adopt him. At the section 366.26 hearing, the focus is on the need of the child for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) If, as in this case, the child is likely to be adopted; the prospective adoptive parents have been the child’s caregivers for the entirety of the child’s life; the child is extremely attached to the caregivers; and the child is healthy and happy in the caregivers’ home, adoption meets the child’s need for permanency and stability.

The juvenile court did not err in proceeding with the section 366.26 hearing.

DISPOSITION

The order terminating Ernesto’s parental rights to E.R. and setting a permanent plan of adoption for E.R. is affirmed.